Visador Company *and* United Steelworkers of America, AFL–CIO, CLC. Case 11–CA–13929

August 8, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 5, 1991, Administrative Law Judge Claude R. Wolfe issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that, the Respondent, Visador Company, Marion, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] On March 12, 1991, the judge issued an Erratum.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed by the Respondent to the judge's finding that it violated Sec. 8(a)(1) by disparately applying its no-solicitation/distribution rule in warning employees Jessie Thomas and Dexter Harris against the distribution of union pencils, and by creating the impression of surveillance by Supervisor Donald Harris Jr.'s statement to employee Michael Henderson that another employee was keeping Harris informed about union meetings.

Michael W. Jeannette, Esq. and *Donald R. Gattalaro, Esq.*, for the General Counsel.
C. Thomas Davis, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me on December 12 and 13, 1990, at Marion, Virginia, pursuant to charges and amended charges filed and served on July 19 and August 29, 1990,[1] and complaint issued on August 31 and amended at hearing alleging that Visador Company (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discharging James Ray Powers and issuing a written disciplinary warning to Ernest Powers, and also violated Section 8(a)(1) of the Act by creating the impression that employee union activities were under surveillance, promulgating an oral rule prohibiting employees from talking to each other at work, interrogating employees concerning their union activities and sympathies, announcing that it intended to enforce its no-solicitation/no-distribution rule, and threatened unspecified reprisals for engaging in solicitation and distribution. Respondent denies the commission of unfair labor practices.

On the entire record, and after considering the demeanor of the witnesses and the posttrial briefs of the parties, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

The complaint alleges, Respondent admits, and I find Respondent is now, and has been at all times material, a Delaware corporation with a plant located at Marion, Virginia, where it manufactures wooden stair parts, and where it received during the 12 months immediately preceding the issuance of the complaint, a representative period, goods and materials valued in excess of $50,000 directly from points outside the State of Virginia. Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

United Steelworkers of America, AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. SUPERVISORS AND AGENTS

At all times material, the following-named persons occupied the positions set opposite their names and have been, and are now, agents[2] of Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

Charles R. Neitch	Plant Manager
Timmy Lee Fout	Production Manager
Donald George Harris Sr.	Ripsaw Supervisor
Jimmy Ray Patton	Rough Mill Supervisor
Edith Byrd	Parking and Utilities
Johnny Harris[3]	Finish and Glue Supervisor

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint sets forth allegations of conduct occurring in the context of a union effort to organize a unit of Respondent's employees. The involvement of the Union with these employees was initiated by James Ray Powers (Jimmy Powers) on April 1 or 2 when he contacted James Cunningham, a union organizer, and requested his assistance in gaining employee support for union representation. Thereafter, James Powers served as the Union's key committee person working in the plant, attended union meetings, wore

[1] All dates are 1990 unless otherwise indicated.

[2] Respondent agrees that the individuals named were supervisors, but denies they are Respondent's agents. It is well settled that conduct of a supervisor is imputed to his or her employer.

[3] Johnny Harris left Respondent's employment about 2 weeks after the Union lost a representation election held among Respondent's employees on or about August 16.

a union T-shirt to work, helped organize a plant committee, handed out pencils bearing the Union's message, and solicited employees to sign cards authorizing the Union to represent them. This activity continued until he was discharged on July 13. All union activity apparently stopped after the Union lost a representation election conducted among Respondent's employees on August 16. During the period of the Union's campaign, April to August, the employees seem to have divided into two groups, one for and one against union representation. Some employees wore union T-shirts, others wore antiunion T-shirts, and there was some harassment of those whose stance they opposed by members of both camps. This then sets the context within which to consider the allegations made by the General Counsel.

The Creation of an Impression of Surveillance

The General Counsel offers several incidents as instances showing Respondent has conveyed an impression it was monitoring employee union activities. Some do and some do not. One that does occurred in mid-June when Donald Harris Jr., supervisor in the ripsaw department, advised Michael Henderson, ripsaw operator, that employee Reese Maloyed was telling him where union meetings were held, who was present, and what they were doing.[4] Such a statement clearly tended to create the impression Respondent was engaged in gathering such information via employee informants, and violated Section 8(a)(1) of the Act because it reasonably tended to interfere with, restrain, and coerce Henderson in the exercise of the rights guaranteed him in Section 7 of the Act.

I conclude, however, that Donald Harris did not create such an impression or otherwise violate the Act in July when, in response to James Powers' advice that he was on the Union's committee, he told James Powers that he had heard Powers was on that committee. A mere recitation that he had heard of Powers' involvement does not suggest that Harris gained this information through the use of surveillance or that Respondent was employing such techniques.

James Powers claims that after he told Harris of his involvement Harris followed him more than usual when he emptied scrap buggies and also followed him into the restroom on several occasions and remained there until Powers left. Employee Bryant Darnell recalls that on a couple of occasions a week apart Harris entered the restroom immediately after Powers did and left the restroom immediately after Powers did. Harris denies following Powers into the restroom. Here, we are dealing with conclusions rather than persuasive probative evidence. The mere fact the Harris and Powers visits to the restroom coincided or overlapped cannot, without more, be reasonably held to create any impression Harris was engaged in surveillance. Such flimsy evidence requires no rebuttal. Similarly, Powers' conclusion that Harris was following him more than usual when he emptied scrap acknowledges that Harris had a practice of at least occasionally following Powers on such errands. It is not surprising that Powers, having openly declared his prominence in the Union's campaign, would view the slightest deviation by Harris from routine with suspicion, and then subsequently convert that suspicion into certainty. Combining this factor with the fragile evidence presented and the further circumstance that Powers is not always a credible witness, a factor discussed below in connection with his ultimate discharge, I am persuaded that this ''following'' by Harris has not in fact been shown to be surveillance or anything other than normal behavior, and cannot be reasonably construed as evidence of an effort to create an impression of surveillance.

Jimmy Patton is the supervisor of the rough mill in Respondent's facility. Ernest Powers is a block saw operator under Patton's supervision. On June 7, the day after he attended a union meeting where the Employees' Stock Option Plan (ESOP) was discussed, Powers was working when Patton approached him and asked what Powers had found out about the ESOP. Powers gave him a noncommittal answer. I agree with the General Counsel that Patton's question concerning ESOP put Powers on notice that Patton was aware that he had attended a union meeting and ESOP had there been discussed. By so doing, Respondent, by its agent Patton, created an impression it was keeping union meetings, attendance at those meetings, and the subject matter discussed at those meetings under surveillance. This violated Section 8(a)(1) of the Act for that reason and, to the extent Patton was inquiring into what was discussed at that meeting regarding the ESOP, also violated Section 8(a)(1) as interrogation concerning employee union activities.[5]

On or about July 12, in the evening as they left work, Patton asked Ernest Powers if he wanted to go with Patton. Powers said he did not because he was going to a meeting. Powers then asked where Patton was going. This drew the response that Patton was going to a whorehouse and Powers was going to get ''f—d whichever place he want.'' Here again I credit Powers' testimony over the bare denial of Patton to a summation of Powers' testimony. Patton's comments were not in the best of taste, but his rather vulgar expression of opinion is not interrogation but an answer which seeks no answer, and his apparent surmise the meeting was a union meeting does not ipso facto create the impression union activities were under surveillance.

Mary Lynn Powers was active in supporting the Union, and openly demonstrated that support by wearing decals, buttons, and T-shirts bearing prounion messages. One day in mid-June she had a conversation with Edith Byrd, her supervisor,[6] which began with Byrd stating she was aware what side Powers was on, could not question her about it, but would like to explain why she opposed the Union, and would also like to change Powers' mind. Powers responded that her mind was made up. Byrd said she respected Powers' decision, but she would like Powers to keep it to herself because it was upsetting the department and Powers should not go

[4] I have credited Henderson, a former employee who left Respondent's employment voluntarily for more attractive employment. His account was straightforward, certain, and believable. Harris merely responded ''No'' to the following question posed by Respondent's counsel:

> Q. Did you ever tell Michael Henderson that Reese Maloyed was telling you things about the Union? Such as when and where Union meetings were being held and who was attending?

Harris bare ''No'' in reply to the suggestive question is not persuasive when weighed against Henderson's apparently candid account. Maloyed testified on other matters, but was not asked and did not testify concerning whether he made such reports to Harris or anyone else.

[5] The facts relied on in this instance are those related by Powers in some detail. His testimony on this conversation appeared to be uncontrived and had the ring of truth. Accordingly, it is credited over the bare denials of Patton to compound questions put by Respondent's counsel.

[6] Powers' detailed testimony concerning what was said is credited over Byrd's bare denials in response to leading questions.

around talking about the Union and trying to get employees to support the Union by signing a union card ''and stuff like that.'' I fail to see any creation of an impression of surveillance in this exchange. Powers had publicly identified herself as a union activist by wearing items so advertising. Accordingly, when Byrd said she knew where Powers stood on the Union she was not intimating there was spying on the employees' union activities or anything of the sort. She was merely stating what Powers had publicly made obvious, that Powers was actively engaged on behalf of the Union. Byrd clearly was, however, instructing Powers, who was under Byrd's supervision, to refrain from talking to employees about the Union. Such an instruction without further definition as to when and where such conversation was enjoined is far too broad and exceeds any valid no-solicitation rule, whether construed as an arbitrarily imposed rule for all employees or a direction delivered only to Powers.[7] In either case it had a reasonable tendency to interfere with, restrain, and coerce Powers, and any other employees to whom it may be applicable, in the exercise of the statutory right to form, join, or assist labor organizations, and therefore violated Section 8(a)(1) of the Act.

B. *Threat of Discharge*

Bryan Richardson, who was an employee in Respondent's glue department until he left in September 1990, gave uncontroverted and credited testimony that Johnny Harris, a statutory supervisor at the time, told him in late June that he was going to have to get rid of employee Sharon Darnell if she did not quit talking about the Union and other problems in the plant. This statement by Harris of his, and therefore Respondent's, willingness to discharge an employee for talking about the Union put Richardson on notice it was risky business to engage in such conversations if he valued his job. Accordingly, I find Harris' statement that he might have to retaliate against Darnell if she continued with her discussions concerning the Union violated Section 8(a)(1) of the Act because it reasonably tended to restrain and coerce Richardson in the exercise of his statutory right to engage in protected union activity.

C. *Statements Concerning Solicitation and Distribution*

The Employees Handbook distributed to all employees contains the following rule which is not alleged to be violative of the Act:

NO-SOLICITATION/DISTRIBUTION RULE

> Solicitation and distribution of literature by nonemployees on company property is prohibited.
>
> Solicitation by employees on company property is prohibited when the person soliciting or the person being solicited is on working time. Working time is the time employees are expected to be working and does not include rest, meal or other authorized breaks.
>
> Distribution of literature by employes on company property in nonworking areas during working time, as defined above, is prohibited.
>
> Distribution of literature by employees on company property in working areas is prohibited.

There is credible testimony from Michael Henderson that Respondent has, despite the above rule, tolerated solicitation by employees on their worktime in connection with raffle tickets, race pools, punchboards, Tupperware, oranges, candy, and flowers for funerals. Henderson further recalls, Patton does not deny, and I conclude that Patton, a supervisor, was soliciting with punchboards during worktime. Jessie Thomas relates that she has observed employees selling Avon products and candy bars during worktime, and she has sold raffle tickets on company time to both employees and her supervisor. Dexter Harris also recalls employees selling candy ''and stuff like that'' while at work, and further recalls seeing a supervisor being solicited to buy a candy bar. The foregoing uncontroverted testimony by employees concerning solicitation in spite of the printed rule persuades me the rule has rather widely been honored in the breach. Respondent argues, however, that the General Counsel has not shown employees were not disciplined for rule violations, and therefore has not proved an essential element of his case which, as explained below, alleges a discriminatory application of the rule. It seems to me that the shoe is on the other foot. The General Counsel has, prima facie, shown what appear to be employee violations of the written rule even in the presence of supervisors, and has shown similar conduct by at least one supervisor, all without any indication of discipline therefor. I do not know of any requirement the proponent of a cause is required to rebut a defense not made. Respondent has proffered no evidence of discipline for any of the solicitation mentioned in the record other than for the distribution of pro and antiunion materials. To the extent the record indicates warnings to both employee factions it merely means that there is a serious question concerning the validity of any such warnings if the only time they are issued is to deter pro and antiunion distribution. This is so because sincere antiunion activity by employees is as much a Section 7 right protected from disparate application of a work rule as prounion action. The record does not show that Respondent was responsible for the antiunion conduct of employees even though it may have welcomed it.

The General Counsel's allegation of disparate application of the written rule is based on the treatment of Jessie Thomas and Dexter Harris on June 26. On that day Thomas gave some pencils bearing the Union's insignia to Harris for further distribution. Harris states he had distributed many such pencils. The Thomas to Harris pencil transfer was detected by Respondent. They were called into the office of Charles Neitch, the plant manager, where he advised them they were in violation of the handbook rule set forth above because they had exchanged the pencils on company time, and warned them not to do it again because he was going to enforce the rule.

Charles Neitch agrees that the two were orally warned for passing out union materials on the job during working time. He also agrees that he called their attention to the no-solicitation/no-distribution rule, and stated it would be obeyed. He states, without contradiction, and I conclude he told the same thing to Bill Gillespie, another employee, when he orally warned Gillespie for passing out hats bearing an antiunion message. Production Manager Timmy Fout was

[7] See *Price's Pic-Pac Supermarkets*, 256 NLRB 742, 746–747 (1981), and *Our Way, Inc.*, 268 NLRB 394, 395 (1983).

present during the warning of Harris and Thomas. He agrees the warning was for exchanging pencils in a work area on company time and was in accord with the written rule of which the two employees were aware. Fout also recalls orally warning Gillespie and Charles Neitch's son Chuck for exchanging antiunion hats.

The evidence shows that the warnings to the four employees concerning pro and antiunion conduct were extraordinary because there is no evidence of other warnings for violations of the rule which appear to have been common occurrences. What Respondent did, I am convinced, was apply the rule to both factions, but this does not obscure the fact the rule was apparently enforced *only* against employees engaged in union related activity, pro and con, while other violations of the rule not involving such activity was tolerated. I make no finding of violation concerning the warnings to Gillespie and the younger Neitch because the General Counsel neither alleges in the complaint nor argues in his posttrial brief that these warnings violated the Act notwithstanding their treatment was as disparate when viewed against the record of the rule's enforcement presented as that of Harris and Thomas. I merely conclude that by disparately applying the rule to and warning Harris and Thomas for engaging in union activity Respondent engaged in conduct reasonably tending to interfere with, restrain, and coerce employees in the exercise of rights guaranteed them by Section 7 of the Act. This conduct violated Section 8(a)(1) of the Act. One could argue, as the General Counsel does, that an adjuration not to repeat the conduct is an implied threat of unspecified reprisals. I need not linger long on this contention because it merely argues that which was a warning was also a threat. The remedy is the same in any case and there is little profit in speculating concerning how many ways conduct might violate Section 8(a)(1). A cease-and-desist order remedies them all without need for further discussion.

D. *The Warning of Ernest Powers*

According to the complaint, Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written warning to Ernest Powers on July 27 and thereafter refusing to rescind it. The circumstances giving rise to the warning were most credibly related by Supervisor Jimmy Patton and saw operator Norma Joan Musser. I have not credited Patton's recollections over those of Powers with respect to incidents previously discussed in this decision, but here Patton's testimony was most convincing and is supported by Musser who was a determined, straightforward, and persuasive witness forcefully and, I believe, truthfully relating conduct of Ernest Powers which she clearly believed was designed to unnerve her because she was not a union supporter. The General Counsel suggests that his witnesses Powers and Bryant Darnell are entitled to credit because they are current employees and therefore unlikely to deliberately falsify, citing *Uarco Industries*, 197 NLRB 489, 491 (1972). The general principle vis-a-vis employee witnesses still in the employ of an employer is sound, but the facts here do not warrant its application. It is difficult to comprehend how the testimony of a witness testifying in support of a charge that he or she has been unlawfully treated is not testifying in his or her own interest as Powers here clearly is. That this may well be and probably is against the Employer's interest does not, in my view, warrant giving his or her testimony extra weight. Turning to Darnell, the principle is inapplicable because his testimony, as will be seen, is ambiguous and noncommittal at best, and is not particularly contrary to Respondent's interest.

Patton credibly testifies that Powers was working on the chop saw[8] on July 27 when Patton, sitting at his desk with his back to the saw operators, heard someone ''yell real loud two or three times.'' He kept turning around looking for the source of the shouts until he detected Powers ''yelling at the top of his lungs.'' Patton continues that he told Powers to quit yelling. To which Powers merely grinned. Patton then proceeded to move two barrels of trash out of the area. He was about 30 feet or so from Powers' work station when he heard someone yell 12 to 15 times. He then detected Powers in the act of yelling, and issued a written warning to Powers for this conduct.

Musser was working at a saw about 3 feet in front of Powers on July 27. She testified that Powers ''kept screaming at the top of his voice, as loud as he could scream. And he kept screaming and screaming.'' She recalls Powers said nothing, but just yelled. She estimates she heard somewhere between 75 and 100 yells from Powers, and she opines Powers was yelling to irritate her because he knew she was against the Union.

Darnell, who was working about 6 to 10 feet behind Powers heard someone yelling, could not identify who it was, and is not certain whether it was one or more persons. He does not exclude Powers from this assessment.

Powers says on direct examination that he was given a written warning for ''excessive talking,'' but amends this on cross-examination to ''talking and yelling.'' He concedes he was first given an oral warning, but denies yelling. He agrees that Musser could hear and observe what he did.

Neither party saw fit to proffer the actual warning as evidence. Absent the benefit of that document, I credit Patton the oral warning was for talking and yelling, but it was the yelling which prompted the written warning. Given Ernest Powers' public expressions of union support, including the wearing of shirts and buttons urging union support, Patton's knowledge of that activity, and Patton's coarse derogatory remarks concerning what Powers would derive from union meetings, it seems fair to conclude Patton was not pleased with Powers' union support. It does not necessarily follow that a subsequent issuance of a written warning to Powers which has not been shown to be disparate treatment, and which was, in my view, fairly earned by Powers' behavior, is enough to constitute a showing that distaste for Powers' union activity was a motivating factor in the issuance of the written warning after Powers failed to heed the oral caution by Patton. Moreover, even if such a motivating factor may be inferred from the evidence, I am convinced the evidence preponderates in favor of a finding, which I make, that Patton would have reacted to Powers' uncalled-for ''hollering'' in exactly the same way in the absence of any union activity. The General Counsel therefore has not shown by a preponderance of the credible evidence the warning of Ernest Powers violated the Act.

[8] The General Counsel emphasizes that Powers was transferred by Patton from his usual station to the chop saw on July 27 which he had not worked on for quite some time. I see no unusual significance in this assignment. Powers agrees the chop saw was easier to run than his other saw and Patton did need his services on the chop saw that day.

E. *The Discharge of James Ray Powers*

James Powers was fired on July 13. On that date Production Manager Fout presented him with a typed note reading: ''You are hereby terminated effective 7–13–90 for creating unsafe working conditions and interfering with production.'' Respondent claims James Powers created his own discharge by three times deliberately causing lumber to fall from his wood buggy adjacent to his saw into the work area of Reese Maloyed, another sawyer, thereby endangering Maloyed. The parties presented several witnesses to the events of July 13. The employees testifying in favor of Powers were union supporters while those testifying against him opposed the Union and had been harassed by union supporters. I have taken this bias of the witnesses into consideration in arriving at my conclusions.

F. *Respondent's Witnesses*

Reese Maloyed, although a somewhat confused witness at times, appeared to be trying hard to honestly relate what happened as best as he recalled. According to Maloyed, boards[9] fell into his work area from Powers' wood buggy three times on July 13. Only five or six boards fell off the first time, and Maloyed does not know if this was an accident or not. He helped Powers pick the wood up. Maloyed says he then saw Powers pry 15 to 20 boards off the load into Maloyed's work area, and, after he again helped Powers pick up the wood, he then saw Powers deliberately dump the entire load of lumber, an estimated 40 to 60 boards, into his work area and hitting him on the ankle. Maloyed believes that had he not been watching Powers and managed to get out of the way he could have suffered a broken leg or ankle.

Stanley Smith was working with Maloyed on July 13 and states that he saw Powers deliberately dump the wood into Maloyed's area on two occasions that day, did not see the wood fall the third and last time, but did see the wood on the floor a third time.

Mark Blevins, working about 25 feet from Powers, remembers seeing Powers deliberately cause about 20 boards to fall one time and, about a half hour or 45 minutes later, deliberately turn the entire load over causing about 50 pieces of wood to fall. He did not see Powers do this any other time that day.

Sherry Blevins, a saw operator also working about 20–25 feet from Powers, says that Powers and Maloyed were running long boards that day, and she saw Powers deliberately push boards off into Maloyed's area once. That was the only time she saw wood fall that day.

G. *The General Counsel's Witnesses*

James Powers testified that several pieces of wood fell off his wood buggy and landed next to Maloyed, but this only happened once, did not injure Maloyed, and was not the result of deliberate action by him.

Roy Wayne Owens, who works on the ripsaw with James Powers, first states he only saw wood fall once on July 13, but then, on cross-examination, gave the following testimony:

Q. You don't remember much of anything except that they fell one time. Is that correct?

A. No, they fell one time. They fell twice.

Q. They fell twice?

A. No, they didn't. . . .

Q. Now, did they fall one time or did they fall twice?

A. Well, they didn't fall twice at the same time.

Q. How many times did they fall on that day?

A. Oh, I don't remember that day, I just remember that they fell twice all together.

JUDGE WOLFE: All the time you worked there, is that you're saying?

THE WITNESS: Yes. All the times— seems like it was maybe one day before—the day before that day, you know.

JUDGE WOLFE: Oh, I see. So, two different occasions.

THE WITNESS: Yes.

Q. But it's not your testimony that they fell twice on July the 13th?

A. No, sir, not that I recall.

Q. And they didn't fall three times then?

A. No, sir, they didn't fall.

Maloyed was a believable witness, and the testimony of Smith and the two Blevins supports Maloyed's testimony that Powers deliberately pushed wood off in Maloyed's area. That Mark and Sherry Blevins testified to seeing less than the three wood spillages does not reflect adversely on their testimony. They struck me as employees testifying only to what each actually saw without speculation. Neither does their testimony diminish Maloyed's credible testimony of three wood spills which is supported by Smith's testimony he saw two wood falls and wood on the floor a third time. Maloyed's version is credited over that of Powers which gains little support from Owens whose testimony was vague and evasive in several particulars in addition to the above quoted excerpt. I conclude that the wood spills of July 13, at least the last two and probably all three, were deliberately engineered by James Powers to harass Maloyed who testified to previous harassment by Powers after Maloyed started wearing an anti-union T-shirt. This conclusion does not, however, resolve the allegation of unlawful discharge.

Mark Blevins and Ronald Boardwine testify to an incident prior to the Union's campaign when Blevins, irritated at Boardwine's efforts to put a length of 4-inch by 4-inch lumber in Blevins' trash bin, three times threw the lumber on the floor. The third time this happened the piece of timber bounced onto Boardwine's foot causing Boardwine to miss 2 days of work. Blevins was not discharged.

In addition to the issue of disparity raised by the comparative treatment of Blevins and Powers for conduct of the same general nature, the events following Powers' misconduct and preceding his discharge indicate a lack of evenhandedness in the treatment of Powers. Maloyed, Smith, and Mark and Shirley Blevins met with Production Manager Fout and Plant Manager Neitch on July 13 shortly after Powers' third wood spill.[10] The four employees gave written statements to Fout and Neitch repeating their oral report they had seen Powers'

[9] The boards involved were over 12 feet long.

[10] It is not clear, but I am persuaded, as Fout testified, that Shirley Blevins requested the meeting.

push the wood into Maloyed's work station.[11] After receiving these papers and consulting with counsel, Fout caused the discharge memo to be typed, called Powers in, confronted him with the information the four employees had given, listened to Powers' denial there had been three wood spills that day, told him he was fired for creating unsafe working conditions, and gave him the discharge memo. Powers asked permission to bring in other employees to attest to his innocence of the conduct with which he was charged. Fout denied this request, telling Powers the decision had been made. Fout concedes there were about 24 employees in the department with 2 to 4 employees other than those giving statements who worked within 10 feet of Powers. He explains that he refused to listen to additional witnesses because of the severity of the incident and because never before had four people come in and told him of such an incident. The following colloquy then followed:

> JUDGE WOLFE: Let me ask a simple question. Why didn't you talk to these other four people? Or three people, or one people? How many people did Powers want to bring in?
>
> THE WITNESS: He just said, ''his people.''
>
> JUDGE WOLFE: Why didn't you let him bring them in?
>
> THE WITNESS: The decision had been made to—from the other four people's testimony . . . .
>
> JUDGE WOLFE: Why didn't you want to investigate his version?
>
> THE WITNESS: I guess because of the rumors that people had come to me and told me about the harassment that was going on.
>
> JUDGE WOLFE: I don't understand that, but I won't ask any questions about it. Move on. Next question.

I still do not understand Fout's explanation to be reasonable or believable. In any event, Fout asked if Powers wanted to talk to Neitch about it.[12] Powers said he did. Fout called Neitch in and said Powers had a few questions to ask. According to Powers, Neitch yelled that he was not answering any questions, the decision had been made, and it was final. Neitch testified on other matters but did not deny this claim by Powers, nor did Fout.

The combination of outstanding union activity by Powers, knowledge of that activity by Respondent's agents and thus Respondent, Respondent's violations of Section 8(a)(1) of the Act in other respects, the more lenient treatment of Mark Blevins for a similar offense, and the refusal to investigate further than the information offered by employees Respondent knew to be opposed to the Union are sufficient to support an inference that James Powers' union activity was a motivating factor in the decision to terminate him. That being so, it is incumbent upon Respondent to demonstrate Powers would have been discharged in the absence of union activity.[13] Respondent has not done so. Although Powers engaged in the conduct for which Respondent says he was terminated, I do not believe that was the real reason for his discharge. Respondent's handling of the Blevins/Boardwine incident indicates it had no draconian policy of discharging employees engaging in conduct potentially, or in that case actually, injurious to other employees. Add to this the fact that all the Respondent knew about Powers' conduct on July 13 was reported by employees openly hostile to the Union, of which Powers was the most prominent employee proponent, and angry at Powers and other union supporters for harassing them. Respondent knew of this hostile relationship yet refused for no good reason shown to interview witnesses proffered by Powers, and failed to investigate further at all. Moreover, the decision to discharge Powers was made and a discharge memo prepared before he was confronted concerning his conduct. In the circumstances of this case, notwithstanding the character of Powers' conduct on July 13, I conclude that Respondent's ''rush to judgment'' and the imposition of discharge for conduct previously treated quite leniently seriously erode its claim of a bona fide, discrimination-free personnel action and warrant a finding Respondent has failed to carry its burden of proving it would have discharged James Powers absent any protected union activity. Accordingly, I find the General Counsel has proved by a preponderance of the credible evidence that the discharge of James Powers was designed to discourage employee union membership and activities, and therefore violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging James Ray Powers for the purpose of discouraging employee union activities, Respondent violated Section 8(a)(3) and (1) of the Act.
4. By coercively interrogating employees about their union activities and sympathies and those of other employees, Respondent violated Section 8(a)(1) of the Act.
5. By threatening employees with discharge and other reprisals because they engaged in union activity, Respondent violated Section 8(a)(1) of the Act.
6. By creating an impression of surveillance of union meetings and the union activities of its employees, Respondent violated Section 8(a)(1) of the Act.
7. By instructing employees they cannot talk to employees about the Union, and by disparately enforcing its no-solicitation/no-distribution rules against employees who support the Union, Respondent violated Section 8(a)(1) of the Act.
8. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.
9. Respondent has not been shown to have committed any unfair labor practices other than those specifically found above.

THE REMEDY

In addition to the usual cease and desist and posting requirements my recommended order will require Respondent to offer James Ray Powers immediate and full reinstatement to his former position of employment or, if it no longer ex-

[11] The statements given Respondent by the four were not offered in evidence. Inasmuch as the General Counsel cross-examined Mark Blevins on the statement he gave Fout, I conclude both parties had access to the statements at trial. Accordingly, I draw no adverse inference against either party for failure to introduce these statements.

[12] I have credited Powers' undenied testimony concerning his request to speak to Neitch and Neitch's refusal to discuss the discharge.

[13] *Wright Line*, 251 NLRB 1083 (1980); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

ists, to a substantially equivalent position of employment without prejudice to his seniority and other rights and privileges and to make him whole for any loss of pay or other benefits he may have suffered by reason of its having unlawfully discharged him. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950) with interest thereon in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also remove from its records any reference to his unlawful discharge, provide him with written notice of such removal, and inform him that his unlawful discharge will not be used as a basis for future personnel actions concerning him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Visador Company, Marion, Virginia, its agents, officers, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in the Union, or any other labor organization, by discharging employees or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of employment.

(b) Coercively interrogating employees concerning their and other employees' union activities and desires.

(c) Threatening employees with discharge or other reprisals if they engage in union activities.

(d) Giving employees the impression that their union activities and meetings are under surveillance.

(e) Instructing employees not to discuss the Union with other employees.

(f) Disparately enforcing its no-solicitation/no-distribution rules against employees because they support the Union.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer James Ray Powers reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this decision entitled ''The Remedy.''

(b) Remove from its files all reference to the unlawful discharge of James Ray Powers and notify him in writing that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Marion, Virginia facility copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply. condition of employment.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in or activities on behalf of United Steelworkrs of America, AFL—CIO, CLC or any other labor organization, by discharging any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT interrogate our employees concerning their or other employees' union activities or desires.

WE WILL NOT make statements that give our employees the impression their union activities and meetings are under surveillance.

WE WILL NOT threaten our employees with discharge, or other reprisals because they engage in union activities.

WE WILL NOT instruct our employees not to discuss the Union with other employees.

WE WILL NOT disparately enforce our no-solicitation/no-distribution rules against employees because they support the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer James Ray Powers immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to the seniority and other rights and privileges enjoyed by him, and make him whole for any loss of pay he may have suffered by reason of his discharge, with interest computed thereon.

WE WILL expunge from our files any reference to the discharge of James Ray Powers, and notify him in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future personnel action against him.

VISADOR COMPANY